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No. 07-376

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In The

Supreme Court of the United States

SPENCER DIESEL INJECTION & TURBO, INC.,

Petitioner,

vs.

THE CITY OF SIOUX CITY, IOWA,
a Municipal Corporation,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Iowa

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

1. The present question was not presented to any Iowa Court and has not been preserved for appeal.

The rules of this Court require that in its Petition for Writ of Certiorari a petitioner must set out inter alia:

> When the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e.g., court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

Rule 14.1g(i).

In apparent compliance with this rule Spencer Diesel states in its Petition:

> The specific issue of whether Petitioner was denied just compensation was raised by Petitioner's strenuous objection at trial to the ruling of the trial court that evidence pertaining to the income that would have been generated by the property was inadmissible, and a lengthy offer of proof was made pertaining to

> valuation of the property based on the income of the property. This issue was raised again in Spencer Diesel's briefs to the Iowa appellate courts, and the specific issue of just compensation pursuant to the Fifth Amendment to the United States Constitution was raised in its opening appellate Brief: "[T]he constitutional issue of whether Spencer Diesel's property was taken without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 18 of the Iowa Constitution is reviewed de novo." (Appellant's Brief, p. 17).

Petition for Writ, p. 9.

Spencer Diesel states the question presented for review is:

> Whether the Iowa Court of Appeals denied Petitioner just compensation pursuant to the Fifth Amendment to the United States Constitution for private property taken for public use.

There is not any quotation from the record showing this issue was raised in the Iowa courts. The City of Sioux City in accord with this Court's rules respectfully states that Spencer Diesel's claim it has preserved error is a "misstatement in the petition." *See* Rule 15(2).

Specifically, Spencer Diesel claims the issue was raised at trial by strenuous objection. No reference or quotations setting forth the objections is included in

the Petition as required by Rule 14.1g(i) as quoted above. Spencer Diesel next claims to have raised the issue in its appellate briefs. No such question was presented to the Iowa Courts by Spencer Diesel in any brief. In the brief to the Iowa Supreme Court (which under Iowa practice was the brief considered by the Iowa Court of Appeals) served October 18, 2006, the following issues are identified as being the questions presented for review:

I. The District Court Erred in Barring All Evidence of the Income Approach to the Valuation of Spencer Diesel's Property.

   A. Preservation of Error.

   B. Introduction.

   C. Spencer Diesel Should Have Been Allowed to Introduce Evidence Regarding the Value of the Property Based on the Revenue That Would Have Been Earned From the Parking Lot.

      1. There Were No Comparable Sales.

      2. Evidence Regarding the Income Approach to the Property Should Have Been Introduced Because it Falls Within Recognized Exceptions to the General Rule.

a. Evidence of the Income of the Parking Lot – An Income Producing Property – Should Have Been Admitted.

b. Evidence of Income Should Have Been Admitted Because of the Lease Exception.

II. The District Court Erred in Denying Spencer Diesel's Request for a Further Continuance and For Time to Obtain Experts.

III. The District Court Erred in Finding That the Value of Spencer Diesel's Property was $202,000.00.

Spencer Diesel Brief to Iowa Supreme Court, p. i-ii.

In Spencer Diesel's Application to the Iowa Supreme Court for Further Review the following issues are presented:

I. The Court of Appeals Erred in Affirming the District Court's Decision to Bar All Evidence of the Income Approach to the Valuation of Spencer Diesel's Property.

A. Introduction.

B. Spencer Diesel Should Have Been Allowed to Introduce Evidence Regarding the Value of the Property

Based on the Revenue That Would Have Been Earned From the Parking Lot.

1. There Were No Comparable Sales.

2. Evidence Regarding the Income Approach to the Property Should Have Been Introduced Because it Falls Within Recognized Exceptions to the General Rule.

    a. Evidence of the Income of the Parking Lot – An Income Producing Property – Should Have Been Admitted.

    b. Evidence of Income Should Have Been Admitted Because of the Lease Exception.

3. The City Waived its Ability to Argue Against the Income-Based Method of Valuing the Property and Should Have Been Estopped From Trying to Exclude the Evidence From Their Own Appraisals.

II. The Court of Appeals Erred in Affirming the District Court's Denial of Spencer Diesel's Request for a Further Continuance and For Time to Obtain Experts.

III. The Court of Appeals Erred in Affirming the District Court Finding That the Value of Spencer Diesel's Property was $202,000.

Spencer Diesel Application for Further Review, p. i-ii.

The only time Spencer Diesel mentioned the Fifth Amendment in either its Brief or Application for Further Review is on page 17 of its original (October 18, 2006) appellate brief. This is the lone citation to the record in support of the claim the federal question was presented to the Iowa courts and preserved for review. However, this sole mention of the Fifth Amendment is not made as part of any argument but under the section of the brief entitled Standard of Review, which is required by Iowa Appellate Rules. Iowa Rule 6.14(1)(f).

Additionally, as Sioux City noted in its brief to the Iowa Supreme Court (Sioux City brief page 11), this case was an appeal to Iowa District Court from a compensation commission award. The Petition to the Iowa District Court was filed by virtue of Iowa Code Section 6B.22 (2001). In such appeals the only question to be determined is the amount of damages which "shall be ascertained and entered of record." Iowa Code Section 6B.23 (2001). In Iowa challenges to matters other than valuation are brought by separate legal action. *See e.g., In Re Condemnation of Certain Rights*, 666 N.W.2d 137 (Iowa 2003), *Mann v. City of Marshalltown*, 265 N.W.2d 307 (Iowa 1978). This rule has now been codified. Iowa Code §6B.3A (2007). No

place in this Petition for Writ of Certiorari is there any showing of any separate action to raise any issue before any Iowa court, except the one issue allowed under the procedure Spencer Diesel used to invoke court jurisdiction, that is solely how much was the land worth.

It is important to note that the Petition filed in District Court, and never amended, has a single claim consistent with Iowa Code §6B.23:

> WHEREFORE, plaintiff has and does hereby appeal from the condemnation award of the Commission and ask that the damages be ascertained and fixed in the amount of $600,000 for the real property, all as provided by law, and for such other relief as the Court deems just and equitable under the premises.

Petition to District Court. Iowa Supreme Court App. P. 10.

There was not any claim raised of deprivation of any rights but merely a plea that damages for the taking be ascertained. Consistent with Iowa law, the Petition on appeal to the Iowa District Court never mentions the Fifth Amendment nor does it make any claim of any deprivation of a constitutional right to just compensation. Thus, not only was a constitutional claim never raised, such a claim could not have been raised under the procedure under which Spencer Diesel proceeded. The only question raised was the

value of the land, an evidentiary, not a constitutional question.

In summary, there is not any claim in any part of the argument made in any appellate pleading before any Iowa Appellate court that Spencer Diesel was deprived of just compensation under the Fifth Amendment to the Constitution of the United States. There is not any claim in any appellate pleading that any ruling by any Iowa court deprived Spencer Diesel of just compensation under the Fifth Amendment. Except for one passing reference to the Fifth Amendment regarding standard of review Spencer Diesel does not even mention the Fifth Amendment in any of its Iowa appellate pleadings. The present question was not presented to the Iowa courts and has not been preserved for review.

2. The decisions of the Iowa Appellate Courts are not inconsistent with prior rulings of this Court.

The primary basis upon which Spencer Diesel urges this Court to grant certiorari is an alleged variance with decisions of this Court. However, neither of the Iowa appellate rulings in this case are at variance with rulings of this Court. Contrary to the argument presented in support of granting the writ, both the trial court and Iowa Court of Appeals found there were comparable sales upon which to base a finding of value. As this Court has noted, valuation is an issue of fact. *Suitum v. Tahoe Regional Planning*

Agency, 520 U.S. 725, 117 S.Ct. 1659 (1997). Similarly in *United States v. Merz*, 376 U.S. 973, 84 S.Ct. 1131 (1964) this Court reviewed procedures in a federal eminent domain action and did not reject comparable sales as a method of determining just compensation by a commission as long as the commission was properly instructed and filed a report in accord with law.

Spencer Diesel does not cite any case from this Court, even by its own analysis, which is contrary to the rulings of the Iowa courts. In this Court's cases on just compensation in eminent domain actions it is recognized that just compensation may be based upon opinion evidence of comparable sales. *Suitum v. Tahoe Regional Planning* Agency, 520 U.S. 725, 742, 117 S.Ct. 1659, 1668 (1997). In the present case, there were sufficient current market transactions in the form of comparable sales for the trial court to make a decision upon the evidence. The trial court's actions in so doing do not arise to a federal constitutional question.

The present Petition is simply an effort by a plaintiff, who failed to make a necessary evidentiary showing, to convert its own failure into a federal constitutional question. The trial court in this case in reliance upon *Kurth v. Iowa Department of Transportation*, 628 N.W.2d 1 (Iowa 2001) ruled in limine that the evidence at trial would be limited to evidence from comparable land sales. The trial court did not admit evidence based on an income valuation approach but did allow an offer of proof on the point.

The Court was correct to do so. Rejection of the income valuation approach was proper because no business was actually conducted on the land being taken, thus all evidence regarding income was speculative. Moreover, there was not any business being taken for which compensation might be due. Iowa Court of Appeals Ruling App. 10. At no point did Spencer Diesel produce any expert witness (or designate an expert as required by Iowa rules) *id.* at 13, to establish that there were not any comparable sales, or that there were existing comparable sales that established a different or higher value, a point upon which the trial court commented:

> The parties waived their right to a jury trial at the final pretrial conference held on February 6. The court further directed plaintiff's counsel to place their income capitalization evidence and related exhibits and/or records in an offer of proof. Such evidence using various hypothetical rental rates and occupancy rates generated a stream of income capitalized at a rate of 6.7 percent suggested the property had a value of up to $600,000. These calculations were performed by the plaintiff's CPA, Robert Houlihan, and are shown in a number of exhibits admitted in the plaintiff's offer of proof. In light of pretrial rulings, the court expected the plaintiff would attempt to show in its case-in-chief and in cross-examination of the city's experts that the subject property was comparable to the sale of 1214-26 Fourth Street at a price of $13.46 per square foot or, perhaps, even

> higher, which would increase the subject property's valuation by 50 percent or $100,000. However, the plaintiff elected to continue with its theory that there were no sales of comparable property near April 23, 2003, and that this court's pretrial rulings and evidentiary rulings were in error and that the matter would be resolved on appeal.

App. 17.

The issues below were treated as evidentiary. The Iowa Court of Appeals held the evidence showed there were comparable sales and that exceptions to general rules which would allow admission of income evidence did not apply because the necessary conditions precedent were not shown to exist.

Spencer Diesel never claimed in the Iowa Appellate Courts that application of these rules deprived it of just compensation under the United States Constitution. There is not any Fifth Amendment constitutional claim in regard to the Court of Appeal's holdings concerning the admission or rejection of evidence in the Application for Further Review. There are not any rulings of this Court which are inconsistent with the evidentiary rulings of the Iowa courts. Nothing in the Iowa decisions is contrary to any cited ruling of this Court or contrary to the requirements of the Fifth Amendment. The Petition for Writ of Certiorari should be denied.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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